Roy Spa, LLC *and* International Brotherhood of Teamsters Local 2. Case 19–CA–083329

May 10, 2016

SUPPLEMENTAL DECISION, ORDER, AND ORDER REMANDING

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On February 28, 2014, Administrative Law Judge Michael A. Marcionese issued the attached supplemental decision. The Applicant, Roy Spa, LLC (Roy Spa), filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Applicant filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision, Order, and Order Remanding.

Roy Spa filed a timely application for an award of fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, on September 12, 2013.[1] On November 22, the judge granted the General Counsel's request for an extension of time until December 24 to file a motion to dismiss the application. We affirm the judge's order granting the extension of time for the reasons stated herein.

On December 20, the General Counsel filed a motion to dismiss, which the judge granted in his supplemental decision.[2] While we agree with the judge's conclusion that the General Counsel was substantially justified in asserting that the Board had jurisdiction over Roy Spa, we nevertheless deny the motion to dismiss the EAJA application and remand to the chief administrative law judge for further proceedings consistent with this decision.[3]

1. The timeliness of the General Counsel's motion to dismiss the EAJA application

Roy Spa contends that the General Counsel's motion to dismiss should be rejected as untimely, because the General Counsel's request for an extension of time to file was itself filed after the deadline for filing the motion had passed.[4] For the reasons explained below we find, under the unique circumstances of this case, that the judge did not abuse his discretion in granting the General Counsel's request for an extension of time. Accordingly, we reject Roy Spa's contentions as to the timeliness of the motion.

Background

Roy Spa filed and served its EAJA application and memorandum in support of the application on September 12.[5] Under ordinary circumstances, the deadline for an answer to that application would have been October 17. However, there was an extraordinary intervening event—the shutdown of the Federal Government from October 1 through 16, due to a lapse in appropriations. As a result, the Board extended all filing periods interrupted by the shutdown by 16 days. See 78 Fed. Reg. 61869 (Oct. 4, 2013). That resulted in the new deadline for an answer to Roy Spa's EAJA application of November 4.[6]

[1] All dates are in 2013 unless otherwise stated.

[2] The judge dismissed the EAJA application in its entirety. In so doing, the judge stated that, absent the filing of timely exceptions, his findings, recommendations, and Order would be adopted by the Board and all objections to them would be deemed waived for all purposes. Subsequently, as stated above, Roy Spa filed exceptions and a supporting brief.

Sec. 102.150(a) of the Board's Rules and Regulations states that review of an order granting a motion to dismiss an application for fees and expenses may be obtained by filing a request for review under Sec. 102.27 of the Board's Rules. Pursuant to Sec. 102.27, we shall the treat the Applicant's exceptions to the judge's supplemental decision as a request for review. See *Golden Stevedoring Co*., 343 NLRB 115, 115 fn. 1 (2004).

[3] Because the Board has been advised that Judge Marcionese has retired from the Agency, the Board requests that the chief administrative law judge designate another administrative law judge in accordance with Sec. 102.36 of the Board's Rules.

[4] Sec. 102.149(b) of the Board's Rules and Regulations provides:

> Motions for extensions of time to file motions, documents, or pleadings permitted by section 102.150 . . . shall be filed . . . not later than 3 days before the due date of the document.

Sec. 102.150(a) provides:

> Within 35 days after service of an application the General Counsel may file an answer to the application. Unless the General Counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file a timely answer may be treated as a consent to the award requested. The filing of a motion to dismiss the application shall stay the time for filing an answer to a date 35 days after issuance of any order denying the motion. Within 21 days after service of any motion to dismiss, the applicant shall file a response thereto.

[5] The certificate of service for the application states that it was served on the General Counsel on September 12. Although the certificate of service for the memorandum in support of the application states that it was served on the General Counsel on "October 31, 2001," we accept Roy Spa's averment that this was a typographical error and that the memorandum also was served on September 12. We accordingly do not rely on the judge's statement in his order granting the General Counsel's request for an extension of time that Roy Spa's memorandum in support of the application was not filed until October 31.

[6] Monday, November 4 was the first business day following Saturday, November 2, the date falling 16 days after the original deadline.

In addition to disrupting filing deadlines, the shutdown apparently had other effects on the processing of Roy Spa's EAJA application. The Board's usual practice is to refer applications for awards of fees and expenses to the administrative law judge who presided over the underlying hearing immediately upon the filing of the application. See Board's Rules and Regulations Section 102.148(b). In this case, however, Roy Spa's application was not referred to the judge until November 5, nearly 2 months later.[7] The General Counsel—miscalculating the deadline based upon the date of the Board's referral to the judge rather than upon the date of filing of the application—then requested, on November 20, an extension of time to file a motion to dismiss the application "from the current due date of December 10, 2013, to December 24, 2013."

Two days later, on November 22, the judge issued a carefully reasoned order granting the General Counsel's request for an extension of time. In considering the General Counsel's request, the judge recognized that the period for filing an answer to the application had already expired. The judge also noted, however, that the Board's rules give significant discretion both to the General Counsel and to the judge with regard the General Counsel's answer, if any, to an EAJA application.[8] Applying that discretion to the "unusual circumstances" presented, the judge granted the out-of-time extension request. In doing so, the judge cited the October 1 through 16 Government shutdown, during which Agency employees were prohibited by law from working. The judge also relied on the fact that, due to the late referral of the EAJA application to the Division of Judges on November 5, "it would not be unreasonable for counsel for the General Counsel to conclude that the time for responding to the Respondent's application had not yet expired" when the request for an extension was made. In granting the extension, the judge found that Roy Spa was not prejudiced by any additional time allowed for the General Counsel to file his answer or motion to dismiss.[9]

Contrary to Roy Spa and our dissenting colleague, we find that the judge clearly did not abuse his discretion by granting the General Counsel's late request for an extension of time to respond to Roy Spa's EAJA application.

[7] November 5 was 1 day after the expiration of the shutdown-extended 35-day period provided in Sec. 102.150(a), although Sec. 102.148(b) states that the application "shall be referred by the Board" "upon filing."

[8] See Board's Rules and Regulations Sec. 102.150, above.

[9] Following Roy Spa's motion for reconsideration, the judge issued an order denying motion for reconsideration on November 26.

Analysis

EAJA does not restrict a judge's discretion to grant an extension of time for the General Counsel to respond to an EAJA application. See generally 5 U.S.C. § 504. Congress neither established any deadline for executive agencies to respond to EAJA applications, nor, indeed, required agencies to respond at all. Rather, Congress delegated to each agency the responsibility to establish "uniform procedures for the submission and consideration of applications." Id. § 504 (c)(1).

Pursuant to this delegated authority, the Board has established uniform procedures that provide for significant discretion in the General Counsel's and administrative law judges' processing of EAJA applications. Section 102.150(a) of the Board's Rules and Regulations provides that the General Counsel *may* file an answer, and provides that a judge *may* treat the absence of an answer as consent to the award requested. And, Section 102.152 provides:

> Further proceedings.
>
> (a) Ordinarily, the determination of an award will be made on the basis of the documents in the record. The administrative law judge, however, upon request of either the applicant or the General Counsel, or on his or her own initiative, may order further proceedings, including an informal conference, oral argument, additional written submission, or an evidentiary hearing. An evidentiary hearing shall be held only when necessary for resolution of material issues of fact.
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> (b) A request that the administrative law judge order further proceedings under this section shall specifically identify the disputed issues and the evidence sought to be adduced, and shall explain why the additional proceedings are necessary to resolve the issues.
>
> (c) An order of the administrative law judge scheduling further proceedings shall specify the issues to be considered.

Thus, the Board's rules—consistent with the statute—provide that a judge may decline to treat the General Counsel's failure to file a timely answer to an EAJA application as consent to the award, and may, on the judge's own initiative, order further proceedings as necessary to resolve the issues, including additional briefing by the parties, or even a further evidentiary hearing.[10]

[10] See *Brandeis School*, 287 NLRB 836, 840 (1987) (judge ordered parties to make additional written submissions under Sec. 102.152, allowing applicant to cure defect in original application by submitting documentation not previously in record), affd. in relevant part 871 F.2d

Granted, the rules expressly contemplate that such further proceedings will not be necessary in ordinary circumstances. But, because the rules would permit a judge, in unusual circumstances, to order additional briefing even after a failure by the General Counsel to timely respond to an EAJA application, the discretion the rules provide does not preclude the authority to grant, for cause, a late request for an extension of time to respond to an EAJA application.[11] We need not here define the precise contours of administrative law judges' discretion in this regard because we find that, under the circumstances of this case, the judge's order fell well within his discretion.[12]

Our dissenting colleague further suggests that it is especially inequitable to grant an extension of time to the General Counsel because the statute establishes a strict 30-day deadline for an applicant to submit an application for fees and expenses. 5 U.S.C. § 504(a)(2) ("A party seeking an award of fees and other expenses *shall*, within 30 days of a final disposition in the adversary adjudication, submit to an agency an application") (emphasis added); see also *Monark Boat Co.*, 262 NLRB 994 (1982) (Board lacked jurisdiction to consider EAJA application received after the due date), enfd. 708 F.2d 1322 (8th Cir. 1983). But Congress, not the Board, chose to limit the period within which an application might be filed. And, as discussed above, Congress did not similarly restrict the Board's authority to adopt procedures that give administrative law judges appropriate discretion to manage the briefing schedules in their cases.[13]

Finally, in striking the General Counsel's motion notwithstanding the unique circumstances that gave rise to the late extension request, the dissent would require the judge to rule on the application without the benefit of a full briefing on the merits. We believe, to the contrary, that allowing the judge to consider both parties' positions before ruling on the application is consistent with the letter and spirit of the statute and with our rules, and will best promote the efficient administration of justice in the circumstances of this case.

Therefore, based on the language of Sections 102.150 and 102.152 of the Board's Rules and Regulations, and

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5, 6–7 (2d Cir. 1989); *Pacific Coast Metal Trades Council (Foss Launch)*, 271 NLRB 1165, 1167–1168 (1984) (General Counsel appropriately submitted new supporting evidence under Sec. 102.152(a) pursuant to judge's request for supplemental memoranda).

[11] Our dissenting colleague finds it "unreasonable to include either an answer to or a motion to dismiss an EAJA application among the 'additional' submissions" provided for under Sec. 102.152. But to deprive a judge of the authority to consider a party's submission solely because of the submission's designation would be contrary to the rules, which authorize the judge to request, sua sponte, such briefing as the judge finds necessary to resolve the issues.

The discretionary language in the Board's EAJA rules is consistent with the Board's general treatment of extensions of other time periods not dictated by statute. See, e.g., Board's Rules and Regulations Sec. 102.16(a) (Regional Director may "[u]pon his own motion or upon proper cause shown by any other party" extend the date of a hearing on a complaint issued under Sec. 10(b) of the Act); Sec. 102.22 (same for deadline for respondent's answer to complaint); Sec. 102.46(a), (d)(1), (e), and (f)(1) (deadline may be extended for "such further period as the Board may allow" for filing of exceptions to administrative law judge's decision, answer to exceptions, cross-exceptions, and answer to cross-exceptions, respectively); Sec. 102.56(d) (Regional Director may, upon his or her own motion or proper cause shown, extend the deadline for filing an answer to a compliance specification). Where the Board has chosen to preclude extensions of time, it has done so explicitly. Sec. 102.46(h) ("No extensions of time shall be granted for the filing of reply briefs"). See also Board's Rules and Regulations Sec. 102.35(a) ("It shall be the duty of the administrative law judge to inquire fully into the facts . . . . The administrative law judge shall have authority . . . (8) To dispose of procedural requests, motions, or similar matters"). We respectfully disagree with our dissenting colleague's assertion that our decision in this matter creates a new, and lower, standard applicable to EAJA cases. Rather, as explained fully above, we recognize that the Board's existing rules and precedent governing EAJA cases provide that administrative law judges may exercise significant discretion in fulfilling their duty to inquire fully into the facts, discretion which clearly encompasses the judge's order here.

[12] Our dissenting colleague notes that Sec. 102.111(c) of the Board's Rules and Regulations permits the filing of documents in unfair labor practice cases after the time prescribed by the rules only "upon good cause shown based on excusable neglect." Because he finds that the General Counsel has not attempted to make such a showing, he would reject the General Counsel's motion to dismiss as untimely filed. We disagree. Assuming, without deciding, that Sec. 102.111(c) applies beyond its precise terms, which refer to documents filed in "unfair labor practice" and "representation proceedings," it is unsurprising that the General Counsel did not attempt to make the showing required by that section to excuse *untimely filed* documents. When the General Counsel filed his request for an extension of time he was patently under the misapprehension that it was well before the deadline for answering the EAJA application. Further, the judge immediately granted the requested extension in an order that explicitly excused the General Counsel's mistake as not unreasonable under the circumstances.

To be clear, we affirm the judge's order because we find that issuing the order was within the judge's discretion under the Board's Rules and Regulations. As discussed above, the Board's EAJA procedures confer upon administrative law judges the authority to order such further proceedings, including additional written submissions, as are necessary to fulfill their duty to resolve the issues presented by EAJA applications. It would serve no useful purpose to require the judge, as our colleague would do, to dismiss a submission the judge determined was necessary to the fulfillment of this duty.

[13] We do not agree with any implication in our colleague's opinion that treating the timing of an initial EAJA application differently from the timing of its subsequent processing is inherently inequitable. Procedural frameworks that couple a strict statutory time limit on the initiation of a legal proceeding with significant flexibility in the timing of the matter's subsequent adjudication are, of course, common in the law. For example, Sec. 10(b) of the National Labor Relations Act establishes a strict 6-month period within which a charging party must file a charge or forfeit Board jurisdiction, but the Act does not similarly constrain the Board's discretion to control the timing of the subsequent adjudication of a validly issued complaint.

upon the unique circumstances of this case, we find that the judge did not abuse his discretion in granting the General Counsel's late request for an extension of time to respond to Roy Spa's application, or in thereafter accepting and considering the General Counsel's motion to dismiss the application.

2. Whether the General Counsel's position was substantially justified

Background

In the underlying complaint, the General Counsel alleged that the Board had jurisdiction over Roy Spa, that Roy Spa was a successor employer, and that it violated Section 8(a)(5) and (1) of the Act when it changed certain of the employees' terms and conditions of employment without notifying and bargaining with the employees' collective-bargaining representative. In its answer, Roy Spa denied all these allegations. At the outset of the hearing, Roy Spa moved for a bifurcated hearing to address the issue of jurisdiction first. The judge denied the motion.[14] The General Counsel argued for jurisdiction over Roy Spa pursuant to the Board's national defense standard. See *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB 318, 320 (1958) (holding that the Board will "assert jurisdiction over all enterprises, as to which the Board has statutory jurisdiction, whose operations exert a substantial impact on the national defense, irrespective of whether the enterprise's operations satisfy any of the Board's other jurisdictional standards"). Although the parties litigated both jurisdictional and unfair labor practice issues, in his decision the judge found that the Board lacked jurisdiction, and having so found, he did not reach the merits of the General Counsel's unfair labor practice allegations. The General Counsel filed no exceptions, and the Board adopted the judge's decision.

In its memorandum in support of its EAJA application, Roy Spa argues that neither the General Counsel's assertion of national defense jurisdiction nor his case on the merits was substantially justified. In his supplemental decision and order granting the General Counsel's motion to dismiss the EAJA application, the judge found that the General Counsel was substantially justified in asserting national defense jurisdiction. Based solely on that finding, the judge granted the General Counsel's motion to dismiss without determining whether the General Counsel's position on the merits of his unfair labor practice allegations was substantially justified. Based on that failure to evaluate the merits of the General Counsel's case as a whole, we reverse the judge and remand.

[14] The judge stated: "I'm going to hear all of the evidence on all aspects of the case." Tr. 15.

Analysis

Under EAJA, a qualifying party who has prevailed in litigation before a Federal agency is entitled to an award of attorney's fees and expenses incurred in that litigation unless the agency can establish that its position was "substantially justified." 5 U.S.C. §504 (a)(1). The General Counsel's litigation position is substantially justified "if a reasonable person could think it is correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 fn. 2 (1988). EAJA provides that "[w]hether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole." 5 U.S.C. §504 (a)(1). Accordingly, the Board does not award EAJA fees for individual complaint allegations but determines whether allegations were substantially justified as "an inclusive whole." *Glesby Wholesale, Inc.*, 340 NLRB 1059, 1060 (2003) (internal quotations omitted). Section 102.144(a) of the Board's Rules and Regulations provides that the burden of proof to show substantial justification rests on the General Counsel.

For the reasons stated in his supplemental decision, we agree with the judge that the General Counsel's position that the Board had jurisdiction over Roy Spa pursuant to the Board's national defense standard was substantially justified. Contrary to the judge, however, we find that the EAJA application cannot be dismissed on this basis alone.

The judge's supplemental decision resolved the sole issue placed before him by the General Counsel's motion to dismiss: whether the General Counsel's position on jurisdiction was substantially justified. But that was not the only issue litigated in this case. The parties also fully litigated the complaint allegations that Roy Spa was a successor employer with a duty to recognize and bargain with its employees' bargaining representative, and that it had violated Section 8(a)(5) by making unilateral changes in its employees' terms and conditions of employment. The fact that the judge's underlying decision dismissing the complaint did not resolve those issues is of no moment in determining whether the General Counsel's litigation position on those allegations was substantially justified. See *T. E. Elevator Corp*., 291 NLRB 1184 (1988) (analyzing, for purposes of EAJA, issues upon which it was unnecessary to pass in underlying decision).[15] Certainly, it cannot be said that an EAJA

[15] The Board's Rules and Regulations require an applicant to "identify the positions of the General Counsel in [the unfair labor practice] proceeding that the applicant alleges were not substantially justified." Sec. 102.147(a). Although Roy Spa's application specifically identified only the General Counsel's position on national defense jurisdiction as not substantially justified, its application claimed that Roy Spa

award will never be appropriate where, although the General Counsel's jurisdictional allegations were substantially justified, his unfair labor practice allegations were not and thus his position as "an inclusive whole" was not substantially justified.[16]

Determining substantial justification requires evaluation of the General Counsel's litigation position as an inclusive whole. Because the judge limited his evaluation of the General Counsel's position to the issue of jurisdiction, that inclusive determination has not yet been made. Accordingly, although we agree with the judge that the General Counsel's position as to jurisdiction was substantially justified, we deny the General Counsel's motion to dismiss the EAJA application, and we remand this case for further consideration of the application, subject to the provisions of Board Rules Sections 102.150 through 102.153.[17]

ORDER

IT IS ORDERED that General Counsel's motion to dismiss is denied. IT IS FURTHER ORDERED that this case is remanded to the chief administrative law judge for assignment to a judge for further proceedings consistent with this Supplemental Decision, Order, and Order Remanding.

Dated, Washington, D.C. May 10, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

Roy Spa timely filed its EAJA application on September 12, 2013.[1] The deadline for the General Counsel to file an answer to the application or a motion to dismiss it was extended as a result of the Government shutdown to November 4.[2] On November 20—more than 2 weeks past the deadline—the General Counsel requested an extension of time to file a motion to dismiss. In his request, the General Counsel claimed that the deadline for filing a motion to dismiss was December 10—more than 5 weeks past the correct deadline—and stated, as the sole grounds for the request, that "[g]iven my current work load I do not anticipate being able to complete the Motion to Dismiss until the requested date." Unlike my colleagues, I believe the judge erred in granting this request. Accordingly, I would reject the General Counsel's motion to dismiss as untimely.

First, the General Counsel's motion to dismiss this application was unquestionably untimely. My colleagues do not dispute that under Section 102.150(a) of the Board's Rules and Regulations, the General Counsel's motion was due November 4, yet the General Counsel took no action in the case until November 20, when he requested an extension of time. That request was itself untimely pursuant to Section 102.149(b), which provides

prevailed on "every significant and discrete portion" of the underlying complaint, including the General Counsel's substantive allegations, and its supporting memorandum further argued that the substantive allegations of the complaint lacked substantial justification. We find that the General Counsel had sufficient notice that Roy Spa was asserting that those allegations were not substantially justified.

[16] In his motion to dismiss, the General Counsel took the position that whether Roy Spa was a "'prevailing party' on the allegations set forth in the Complaint" was "an open question, as the Complaint was dismissed only for lack of jurisdiction." Contrary to the General Counsel, Roy Spa's status as a prevailing party for purposes of EAJA is not an open question. See *Shrewsbury Motors*, 281 NLRB 486 (1986) (adopting judge's finding that EAJA applicant was a prevailing party where General Counsel's complaint was withdrawn for lack of merit). Roy Spa prevailed in this matter because the judge found that the General Counsel did not establish jurisdiction, and the resulting dismissal of the complaint placed Roy Spa in the same position it would have been had the complaint been dismissed on the merits. Id. at 487.

[17] The General Counsel may file an answer to Roy Spa's application within 35 days following the issuance of this Order. Board's Rules and Regulations Sec. 102.150(a). If the General Counsel elects to file an answer, Roy Spa may file a reply, and both parties may seek to introduce supporting evidence not already in the record as provided under Secs. 102.150(c) and (d) and 102.152 of the Board's Rules and Regulations. Any answer filed by the General Counsel may include, but need not be limited to, "issues or arguments that may have been presented in in any prior pleading by the General Counsel, including a motion to dismiss the EAJA application." See *Meaden Screw Products Co.*, 336 NLRB 298, 299 (2001).

Our dissenting colleague protests that this procedural consequence of our decision "compounds the judge's error," and unfairly allows the General Counsel "two bites at the apple." But our colleague's objection turns essentially on his conclusion—with which we disagree—that the judge erred in granting the General Counsel's request for an extension of time to file the motion to dismiss. Assuming, as we have found, that the extension of time was validly granted, but that the motion to dismiss should be denied, our colleague does not and cannot dispute that our rules and precedent require permitting the parties to further brief the underlying issues. See, e.g., *T. E. Elevator Corp.*, 291 NLRB 1184, 1184–1185 (1988) (describing procedural history including denial of General Counsel's motion to dismiss and subsequent further briefing under Sec. 102.150). Indeed, to do otherwise would require the judge to make a determination without the benefit of the parties' positions. We cannot conclude that such a result would further the just administration of either the Act or EAJA.

[1] All dates hereafter are in 2013.

[2] The judge found that the General Counsel's response was due November 4, and the General Counsel has not excepted to this finding.

that extension of time requests in EAJA proceedings must be filed "not later than 3 days before the due date" of the motion itself—here, November 1. Neither the judge nor the majority even attempt to explain how the General Counsel's request complies with Section 102.149(b).

Instead, the majority asserts that EAJA and the Board's rules give judges discretion in the handling of EAJA applications, and that this discretion "does not preclude the authority to grant, for cause, a late request for an extension of time to respond to an EAJA application." This new standard my colleagues create today—the "precise contours" of which they leave undefined—is significantly more lenient than the late-filing standard applicable in unfair labor practice cases, under which a party may file out of time only where "good cause is shown based on excusable neglect," no party will be prejudiced, and the attorney has filed a sworn affidavit attesting to the same. Section 102.111(c) of the Board's Rules and Regulations. The majority provides no valid justification for their view that a lower standard should apply in EAJA cases.[3]

Second, no sufficient cause has ever been shown here under either standard. The only reason advanced by the General Counsel for an extension of time, a bare assertion of "current workload," is patently insufficient to show good cause. See *V. Garofalo Carting*, 362 NLRB No. 170, slip op. at 2 (2015) (unsworn assertions of a heavy workload do not excuse failure to file a timely answer). And the General Counsel has provided no explanation whatsoever for his failure to timely file the request for an extension of time, which appears to have resulted from sheer miscalculation, which does not excuse untimeliness. See, *Elevator Constructors Local 2 (Unitec Elevator Services Co.)*, 337 NLRB 426, 428 (2002) ("[A] late document will not be excused when the reason for the tardiness is solely a miscalculation of the filing date.").

Contrary to these principles, the majority finds that the circumstances of this case establish "cause" all the same. In my view, their reasoning does not withstand scrutiny. My colleagues cite the Government shutdown, but that event only extended the due date for the General Counsel's motion to dismiss to November 4 (and the due date for his motion for an extension of time to file a motion to dismiss to November 1). Neither the judge nor my colleagues justify their apparent belief that the shutdown entitles the General Counsel to additional time in this case. To the contrary, in other cases involving tardy filings following the conclusion of the October 2013 Government shutdown, the Board strictly enforced the requirement that "excusable neglect" be proven.[4] The majority also cites the General Counsel's apparent miscalculation of the due date, which the judge found reasonable because the EAJA application was not transmitted to the judge until November 5. But under the Board's Rules and Regulations, the time for responding to an EAJA application runs from *service* of the application, not from transmittal of the application to the judge,[5]

[3] In support of their finding that the judge acted permissibly when he granted the General Counsel's untimely request for an extension of time to file a motion to dismiss the EAJA application, the majority relies on language in Sec. 102.150(a) of the Board's Rules and Regulations providing that the General Counsel *may* file an answer to an application, and that a judge *may* treat the General Counsel's failure to file an answer as consent to the requested award. My colleagues fail to explain, however, how the General Counsel's discretion not to file an answer or the judge's discretion to treat that failure as a consent to the award somehow equates to discretion to disregard Sec. 102.149 of the Board's Rules and Regulations, which mandates that motions for an extension of time to file an answer to or motion to dismiss an EAJA application "*shall* be filed . . . not later than 3 days before the due date of the document" (emphasis added).

My colleagues also rely on Sec. 102.152 of the Board's Rules and Regulations. Contrary to the majority, Sec. 102.152 does not support their position that a judge may order additional briefing "even after a failure by the General Counsel to timely respond to an EAJA application." In fact, as its title indicates, Sec. 102.152 addresses the conduct of "further" proceedings *after* the General Counsel files an answer or a motion to dismiss, and *after* the EAJA applicant has filed either a response to a motion to dismiss under Sec. 102.150(a) or a reply to an answer under Sec. 102.150(d). It provides that EAJA cases will "ordinarily" be resolved on the basis of the documents in the record, i.e., the application, any answer or motion to dismiss filed by the General Counsel, and any reply to an answer or response to a motion to dismiss filed by the applicant. And it provides that the judge may, upon request or his or her own initiative, allow *those* documents to be supplemented by "further proceedings," including the filing of "additional" written submissions. I believe that it is unreasonable to include either an answer to or a motion to dismiss an EAJA application among the "additional" submissions permitted by this provision. In sum, Sec. 102.152 does not provide a procedure for extending the deadline to answer or move to dismiss an application; rather, motions to extend that deadline are governed by Sec. 102.149.

[4] See, e.g., *Postal Service*, Case 13–CA–078058, 2013 WL 6446248 (Dec. 9, 2013) (denying General Counsel's motion to accept late exceptions and supporting brief where reasons proffered involving miscalculation of deadline "do not rise to the level of excusable neglect"); *Apple American Group LLC Applebees*, Case 18–CA–103319 (April 22, 2014), motion for reconsideration filed May 9, 2014, motion granted May 29, 2014 (denying motion for late acceptance of brief notwithstanding explanation that respondent's counsel attempted to electronically file timely exceptions and supporting brief and was prevented from doing so by unavailability of Board's website during Government shutdown, and Board notice regarding tolling of deadline was not served on respondent; Board granted motion for reconsideration in absence of opposition by other parties).

[5] See Sec. 102.150(a): "Within 35 days *after service of an application* the General Counsel may file an answer to the application. . . . The filing of a motion to dismiss the application shall stay the time for filing an answer . . ." (emphasis added).

and the majority finds, and I agree, that Roy Spa served its application on September 12. Again, miscalculation of a due date does not constitute good cause. *Unitec Elevator Services Co.,* above. [6]

Third, as noted above, the Board generally requires a *showing* of good cause *based on excusable neglect* before documents may be filed out of time in unfair labor practice cases. Although the General Counsel has never even asserted good cause, much less shown it, the majority excuses the General Counsel from this requirement as well. In my colleagues' view, the General Counsel was excused from attempting to show good cause in his request because he mistakenly believed that the request was timely. Again, miscalculation of a due date does not constitute good cause, *Unitec Elevator Services Co.,* above, and I am unaware of any precedent for the proposition that this rule is waived where, as here, a party is so inattentive to the deadline that he does not even realize he has missed it. My colleagues also excuse the General Counsel's subsequent failure to show good cause on the grounds that the judge immediately granted the requested extension and thereby "explicitly excused the General Counsel's mistake as not unreasonable under the circumstances." This reasoning is completely circular: the validity of the judge's order excusing this mistake is precisely what is at issue here, but my colleagues rely on the order as a basis for affirming the order notwithstanding the General Counsel's failure to prove good cause or excusable neglect either to the judge or the Board. Once the judge recognized that the General Counsel's request was untimely, the only appropriate action was to deny the request because it failed even to assert good cause for the untimely filing, let alone to establish it.[7]

I believe that the leniency afforded the General Counsel in this case is especially inequitable in the EAJA context. EAJA applicants are held to a strict 30-day deadline, with no extension of time available for the filing of the application regardless of the circumstances. See *All Shores Radio Co.*, 286 NLRB 394 (1987) (Board rejects, for lack of jurisdiction, EAJA application filed after 30-day deadline, where applicant had received extension from the Board's Executive Secretary and filed within the extended deadline), rev. denied 841 F.2d 474 (2d Cir. 1988). Given the role assigned to the General Counsel in the administration of the Act, I believe that his representatives should, at a minimum, be required to show good cause for untimely filings in EAJA cases under the same "good cause" standard applied by the Board in other contexts.

Fourth, the majority compounds the judge's error (permitting the General Counsel to file the motion to dismiss out of time) by now allowing the General Counsel to file an answer. The Board's EAJA procedures already favor the General Counsel by affording him "two bites at the apple" in every EAJA case by allowing him to file a motion to dismiss the application and then respond again to the application in an answer if the motion to dismiss is denied. See *Meaden Screw Products Co.*, 336 NLRB 298 (2001).[8] However, those procedures at least require the General Counsel to file a *timely* motion to dismiss in order to secure that second bite. Section 102.150(a) provides that the filing of a motion to dismiss *stays* the time for filing an answer. A deadline cannot be stayed when it is already in the rearview mirror. As noted, the deadline for filing an answer to Roy Spa's application was November 4. While a motion to dismiss filed on or before that date would have stayed the time for filing an answer, I believe that it is unreasonable to contend that the General Counsel's motion to dismiss, filed on December 20, stayed a deadline that had already passed. Indeed, the Board's discussion of EAJA procedures in *Meaden Screw* is precisely to the contrary:

> Under the Board's Rule, the General Counsel normally has 35 days in which to file an answer to the application unless he decides to file a motion to dismiss the application. *In that situation*, the rule permits the filing of a motion to dismiss to extend the normal 35-day filing requirement for an answer to an additional "35 days after issuance of an order denying the motion."

Id. at 299 (emphasis added). In *this* situation, by contrast, the 35-day filing requirement for an answer was not extended because the motion to dismiss was not filed within 35 days following service of the application. The majority's decision to permit the General Counsel to file an answer all

[6] In his tardy request for an extension of time to file a motion to dismiss, the General Counsel cited his "current work load" as the sole basis for the request. The General Counsel did not claim that his tardiness was caused by any confusion created by the "extraordinary intervening event" of the Government shutdown or the delay in referral of the application to the judge. The judge and my colleagues advance those arguments for him.

[7] Because the issue before the Board is whether the judge's order was correct, I need not decide whether, in the particular circumstances of this case, the judge would have acted permissibly had he given the General Counsel notice that the request was untimely and afforded him an opportunity to demonstrate good cause before ruling on the request.

[8] Notably, other Federal agencies apply tighter deadlines for an agency response to an EAJA application and do not allow motions to dismiss in addition to an answer. See 49 C.F.R. § 826.32(a) (National Transportation Safety Board rules provide 30-day deadline for answer, with no provision for motion to dismiss); 14 C.F.R § 14.22(a) (same, Federal Aviation Administration); 49 C.F.R. § 1016.303(a) (same, U.S. Department of Transportation); 29 C.F.R. § 16.302(a) (same, U.S. Department of Labor).

the same cannot be reconciled with the Board's EAJA rules or this precedent.

The General Counsel's representatives perform important work, often under difficult circumstances. Despite the additional challenges presented by the 2013 shutdown of the Federal Government, I believe that the Board should still expect the General Counsel to understand and comply with the filing deadlines imposed by the Board's rules. Moreover, given the unbendingly strict deadline imposed on EAJA applicants, I believe it is unfair to waive the deadlines our rules impose on the General Counsel, particularly where he neither shows nor even *attempts* to show good cause. I would not accept untimely responsive motions or pleadings in EAJA proceedings unless the General Counsel is able to show good cause based on excusable neglect for the delay. Because no such showing was even attempted in this case let alone shown, I would strike the General Counsel's untimely motion to dismiss and direct the judge to decide the issues presented by the application on the basis of the existing record. My colleagues, however, excuse the General Counsel's repeated failures in this case and afford him yet another opportunity to respond. I believe this leniency is unjustified, and therefore, I respectfully dissent.

Dated, Washington, D.C. May 10, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

Ryan Connolly, Esq., for the Acting General Counsel.
Michael Avakian, Esq., for the Respondent.
Timothy J. McKittrick, Esq., for the Charging Party.

SUPPLEMENTAL DECISION AND ORDER

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This is a Supplemental Decision and Order concerning the Respondent's (Roy Spa, LLC) application for an award of attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 4 U.S.C. § 504 and Section 102.143 of the Rules and Regulations of the National Labor Relations Board (the Board). Because I find that the General Counsel was substantially justified in litigating this case, I deny the Respondent's application.

On October 31, 2012, the Regional Director for Region 19 of the Board, acting on behalf of the Acting General Counsel, initiated the litigation in this matter by issuing a complaint and notice of hearing alleging that the Respondent violated Section 8(a)(1) and (5) of the Act. The complaint was subsequently amended at the hearing. On November 14, 2012, the Respondent filed its answer to the complaint denying, inter alia, that the Board had jurisdiction over the Respondent.

On February 20 and 21, 2013, I presided over a hearing in this matter. At the opening of the hearing, the Respondent moved to bifurcate the proceeding so that a hearing on the jurisdictional issue would be conducted first to be followed by a hearing on the substantive allegations of the complaint only after it was determined that the Board had jurisdiction over the Respondent. I denied this motion on the record.

On June 28, 2013, I issued a decision which found that the Respondent did not meet either the Board's discretionary jurisdictional standards or the national defense standard for. asserting jurisdiction. As a result, I dismissed the complaint in its entirety. On August 13, 2013, no exceptions having been filed, the Board issued an order adopting the findings and conclusions of my decision and dismissing the complaint.

On September 12, 2013, the Responded filed its EAJA application along with a memorandum in support of the application and affidavits. On November 5, 2013, the Board issued an order referring the matter to me for decision. On December 20, 2013, pursuant to Section 102.150, counsel for the Acting General Counsel filed a motion to dismiss the Respondent's application. On December 27, 2013, I issued an order to show cause why the General Counsel's motion should not be granted and on January 17, 2014, the Respondent filed its response to the show cause order.

In its application, the Respondent asserts that it is the prevailing party in an adversary adjudication before the Board, that it had a net worth less than $7 million and employed less than 500 employees, that the General Counsel was not substantially justified in pursuing the matter, and that it incurred $64,956.25 in attorney's fees[1] and $3,320.65in expenses in defending itself against the complaint. Counsel for the Acting General Counsel, in his motion to dismiss, did not address whether the Respondent was a "prevailing party" and whether the enhanced attorney's fees were justified and compensable. Instead, counsel relied solely on its position that the Acting General Counsel was justified in litigating this case.

Under the statute and the Board's Rules and Regulations, Section 102.144, the General Counsel has the burden of proving that an award of fees should not be made to an eligible applicant. The General Counsel may meet this burden with a showing that its position in the litigation was "substantially justified." The Supreme Court, in *Pierce v. Underwood,* 487 U.S. 552 (1988), held that "substantially justified" means "justified to a degree that could satisfy a reasonable person", or "if it has a reasonable basis both in law and fact." The government is "substantially justified" where the evidence is "what a reasonable mind might accept as adequate to support a conclusion", i.e., where "reasonable people could differ" on whether the allegation should be litigated. Id. at 563–566. The Board applies this standard, as explained in *Galloway School Lines,* 315 NLRB 473 (1994):

> The Board has stated that substantial justification does not mean substantial probability of prevailing on the merits, and

[1] The Respondent also seeks enhanced attorney's fees, at the rate of $475/hour, due to the specialized nature of the case.

> that it is not intended to deter the agency from bringing forward close questions or new theories of law. The Supreme Court has defined the phrase "substantial justification" under EAJA as "justified to a degree that could satisfy a reasonable person" or having a "reasonable basis in law and fact." [citation omitted]. Thus, in weighing the unique circumstances of each case, a standard of reasonableness will apply.

315 NLRB at 473. See also *Meaden Screw Products Co.,* 336 NLRB 298 (2001); *Jansen Distributing Co.,* 291 NLRB 801, fn. 2 (1988). Accord: *Golden Stevedoring Co.,* 343 NLRB 115 (2004); *Glesby Wholesale, Inc.,* 340 NLRB 1059 (2003).

The complaint in the instant case alleged that the Respondent was a successor employer with respect to the operation of a barber shop on the premises of Malmstrom Air Force Base in Great Falls, Montana, that it had an obligation to recognize and bargain with the Charging Party, which had represented the employees at the barber shop for a number of years, and that it had unilaterally changed the employees terms and conditions of employment after taking over the barber shop in 2011. The General Counsel alleged jurisdiction under the Board's national defense standard. As noted, the Respondent took the position from the beginning that it was not an employer engaged in commerce within the meaning of the Act.

The evidence presented at the hearing showed that, although the Respondent was based in Virginia and operated hair care facilities at military installations in Arizona, Texas, Florida and Massachusetts, it's gross revenues for calendar year 2011, the year in which it acquired the contract at Malmstrom, did not exceed $500,000. The General Counsel essentially conceded this point, relying instead on the national defense standard as a basis for asserting jurisdiction over the Respondent's operations at Malmstrom.

In making my decision to dismiss the complaint, I noted that the Respondent met the *statutory* definition of an employer engaged in commerce because it operated in several states in addition to its home state of Virginia. I found, based on the parties' stipulation, that the Respondent did not satisfy the *discretionary* retail standard, i.e., gross revenue in excess of $500,000, for the assertion of jurisdiction over a barber shop. *O K Barber Shop,* 187 NLRB 823 (1971). In discussing the Board's national defense standard, I noted that the Board had historically applied that standard to assert jurisdiction over barber shops on military bases that were similar to Respondent's operation. See *Spruce Up Corp.,* 181 NLRB 721 (1970) and *Gino Morena Enterprises,* 181 NLRB 808 (1970). Although the evidence in those cases showed that the employers also satisfied the Board's discretionary standards, it was the national defense standard that was cited by the Board as a basis for jurisdiction. In my decision, I also discussed that, in more recent cases, the Board had declined jurisdiction over hair care facilities under the national defense standard where the facts were distinguishable from the older cases. See *Fort Houston Beauty Shop,* 270 NLRB 1006 (1984), and *Pentagon Barber Shop,* 255 NLRB 1248 (1981). The Board did not overrule the older cases. Before reaching my conclusion that the national defense standard was not sufficient on the facts here to assert jurisdiction, I expressly stated that this case fell between the two lines of cases cited above. The latter cases were sufficiently distinguishable from the facts here that they did not compel dismissal of the complaint just as the facts of the older cases were sufficiently distinguishable that they did not compel the assertion of jurisdiction. Because the Board had never addressed the exact factual situation here, "reasonable minds" could differ as to whether the Respondent's operations were closer to the facts of *Spruce Up* and *Gino Morena* than *Ft. Houston* and *Pentagon*. See *University of New Haven,* 279 NLRB 294, 295 (1986) (finding substantial justification where precedent was not so factually identical as to be "conclusive" of a particular issue). *Welter v. Sullivan,* 941 F.2d 674, 676 (8th Cir. 1991) (the Government will be found to be substantially justified where "at least one permissible view of the evidence shows a reasonable basis in law and fact" and "closeness itself is evidence of substantial justification.").

The Courts and the Board have held that EAJA was never intended to "stifle the reasonable regulatory efforts of federal agencies," or to deter the government from "advancing in good faith a close question of law or fact." *Wyandotte Savings Bank v. NLRB,* 682 F.2d 119, 120 (6th Cir.1982); *Shellmaker, Inc.,* 267 NLRB 20, 21. See also *Abell Engineering & Mfg., Inc.,* 340 NLRB 133 (2003); *Galloway School Lines,* supra at 473. Here the question of jurisdiction was close and could have gone either way. Under these circumstances, the General Counsel was substantially justified in issuing the complaint and litigating the issue of jurisdiction rather than dismissing the unfair labor practice charge and leaving the Charging Party and the employees it represented with no remedy for a potential violation of the act.

Having found that the General Counsel was substantially justified in litigating this matter, I shall grant the Acting General Counsel's motion to dismiss the Respondent's application for an award of fees and expenses under EAJA.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent's Application for an Award of Fees and Expenses pursuant to the Equal Access to Justice Act is dismissed.

Dated, Washington, D.C. February 28, 2014

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.